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13 **UNITED STATES DISTRICT COURT**
14 **EASTERN DISTRICT OF WASHINGTON**

15 ELF-MAN, LLC,

16 Plaintiff,

17 vs.

18 RYAN LAMBERSON,

19 Defendant.

No. 2:13-CV-0395-TOR

DEFENDANT LAMBERSON'S
RESPONSE TO PLAINTIFF'S
MOTION TO ADD ADDITIONAL
DEFENDANT

20 Defendant opposes Plaintiff's Motion to Add Additional Defendant (ECF No. 28).

21 Plaintiff's Motion cites Fed. R. Civ. P. 21 as its basis. Rule 21 does authorize
22 the Court to add a party; however, it does not expressly allow the addition of a
23 fictitious party.
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1 State civil procedure rules employed by federal courts under the *Erie v.*
2 *Tompkins*, 304 U.S. 64 (1938) doctrine as to state law claims in diversity actions
3 sometimes permit an action to be brought against an unknown or unidentified
4 person, usually by designating such person by a fictitious name, with subsequent
5 substitution of the person's true name when it is discovered. *Lindley v. General*
6 *Elec. Co.*, 780 F.2d 797, 800-01 (9th Cir.1986), cert. denied 476 U.S. 1186 (1986)
7 (finding California's Doe statute to be "substantive" state law under *Erie* doctrine).
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9
10 Plaintiff's claims against Mr. Lamberson, however, are exclusively federal
11 (17 U.S.C. §301), and there is no such express provision in the Copyright Act for
12 the use of fictitious parties. Likewise, there is no such express provision in the
13 Federal Rules of Civil Procedure for the use of fictitious parties. *Molnar v. National*
14 *Broadcasting Co.*, 231 F.2d 684, 687 (9th Cir.1956); *Fifty Associates v. Prudential*
15 *Ins. Co.*, 446 F.2d 1187, 1191 (9th Cir. 1970); *Coupons, Inc. v. Stottlemire*, 588 F.
16 Supp. 2d 1069, 1072 (footnote 2 dismissing Doe defendants in copyright action)
17 (N.D. Cal. 2008); *Buckheit v. Dennis*, 713 F. Supp. 2d 910, 918 (N.D. Cal. 2010).
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21 The Scheduling Order in this case (ECF No. 17) set a February 17, 2014
22 deadline for a motion to amend the pleadings or to add additional parties.
23 Defendant timely moved to file a Second Amended Answer, Affirmative Defenses,
24 and Counterclaim (ECF No 21.) Although plaintiff timely brought the instant
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1 Motion, it is not proper because no additional party is identified. In other words,
2 plaintiff did not discover any such potentially liable additional party in time to meet
3 the deadline imposed by the Court.
4

5 Mr. Lamberson's case has been severed from the combined case. Mr.
6 Lamberson has been served with discovery and has timely responded to all
7 inquiries. Mr. Lamberson has been available for interview or deposition. Mr.
8 Lamberson has alleged in his First Amended Answer, Affirmative Defenses and
9 Counterclaim (ECF No. 18 at pages 26-27) that he did not copy *Elf-Man* nor is he
10 aware of anyone who did.
11

12 Indeed, plaintiff's Motion acknowledges that Mr. Lamberson may not be
13 liable. Plaintiff's counsel's Declaration (ECF No. 28-1 at page 2) indicates that
14 plaintiff makes its Motion so it can use this case as a vehicle to "drop" Mr.
15 Lamberson if he is not liable "and to name another party as Defendant." But, if Mr.
16 Lamberson did not infringe, then plaintiff does not prevail on Mr. Lamberson's
17 severed case – there is no "additional party" that is relevant to that inquiry.
18

19 In other words, either Mr. Lamberson is liable, or he is not – and this will be
20 decided in this severed case. If plaintiff has evidence that some other person has
21 liability, then it can proceed and bring a new action against that person with a new
22 statute of limitations clock. If plaintiff discovers that Mr. Lamberson somehow
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1 acted in concert with another person in a manner that violates the Copyright Act,
2 then plaintiff could move to amend at the time that has been discovered, using real
3 liability evidence as the basis for such a motion. This would allow Mr. Lamberson
4 to confront that evidence in a substantive manner and not in a response to a
5 generalized motion to add a fictitious party as is the case in the present Motion. But
6 if plaintiff desires to “drop” Mr. Lamberson because in the end there is no evidence
7 that he is liable under the Copyright Act, then Mr. Lamberson becomes a prevailing
8 party who can request defense attorneys’ fees under *Fogerty v. Fantasy*, 510 U.S.
9 517 (1994), and he should be able to do that unfettered in his severed action.
10

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12 “Adding” a fictitious party would prejudice Mr. Lamberson. If plaintiff
13 discovers no evidence against Mr. Lamberson, and Mr. Lamberson prevails by
14 summary judgment, then Mr. Lamberson would have to await conclusion of the
15 entire matter in order to pursue costs and attorneys’ fees, or to await plaintiff’s
16 appeal of his summary judgment.
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20 Defendant respectfully requests that plaintiff’s Motion to add a fictitious
21 party be denied.
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1 DATED this 28th day of February, 2014.

2
3 LEE & HAYES, PLLC

4 By: s/ J. Christopher Lynch

5 J. Christopher Lynch, WSBA #17462

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Counsel for Defendant Ryan Lamberson

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of February, 2014, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Maureen C. VanderMay efile@vandermaylawfirm.com

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